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June 8, 2015

Via Electronic Filing
Clerk of Court
MICHIGAN SUPREME COURT
Michigan Hall of Justice
925 W. Ottawa Street
Lansing, MI 48913

Re: City of Holland v Consumers Energy Company; City of Coldwater v Consumers Energy Company; Supreme Ct. No. 151053 and Supreme Ct. No. 151051

Dear Clerk:

Enclosed herewith for electronic filing in the above-entitled matter, please find The Association of Businesses Advocating Tariff Equity's Motion For Leave to File an *Amicus Curiae* Brief; and an *Amicus Curiae* Brief along with a Proof of Service.

Thank you for your assistance with this filing. If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

CLARK HILL PLC

/s/ Roderick S. Coy

Roderick S. Coy

RSC:jmw
Enclosures
cc: Parties of Record

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STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

CITY OF HOLLAND, Plaintiff-Appellee, v CONSUMERS ENERGY COMPANY, Defendant-Appellant. and CITY OF COLDWATER, Plaintiff-Appellee, v CONSUMERS ENERGY COMPANY, Defendant-Appellant.	Supreme Court No. 151053 Court of Appeals No. 315541 Lower Court 12-002758-CZ Supreme Court No. 151051 Court of Appeals No. 320181 Lower Court 13-040185-CZ

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ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

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ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Association of Businesses Advocating Tariff Equity ("ABATE"), by its counsel, and pursuant to MCR 7.306(D), respectfully requests that this Court grant leave to file an *Amicus Curiae* brief, and accept for filing the *Amicus Curiae* brief submitted contemporaneously. In support of its motion, ABATE states:

1. Amicus Association of Businesses Advocating Tariff Equity ("ABATE") is a 34 year old association of major energy consuming corporations who have joined together to solve problems related to the supply of electric power and transportation of natural gas to industrial facilities located in the State of Michigan. A significant amount of ABATE's activities involves representing the interests of its members before courts, the United States Congress, the Michigan Legislature, and state and federal administrative regulatory agencies. ABATE appears before this Court as a representative of a number of major energy-consuming corporations which collectively make up a substantial part of Michigan's industrial economy and job providers who are adversely affected by the issues currently before this Court.

2. The Michigan Supreme Court has on occasion invited ABATE to file briefs in cases where it was not a party but substantial issues involving utility rates were present. This is one of those cases. The Court of Appeals below accepted ABATE's Amicus Brief.

3. In its role as a representative of a number of major energy-consuming corporations, ABATE appears before this Court in support of the Plaintiff-Appellees in this proceeding.

4. An Amicus Curiae brief prepared and submitted by ABATE setting forth the perspectives of a number of major energy-consuming corporations, which collectively make up a

substantial part of Michigan's industrial economy and are adversely affected by the issues in this case, will assist the Court in analyzing this important issue.

WHEREFORE, for the reasons stated above, ABATE respectfully requests that this Court grant leave to file an *Amicus Curiae* brief, and accept for filing the *Amicus Curiae* brief submitted contemporaneously with this motion.

Respectfully submitted,

CLARK HILL PLC

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Dated: June 8, 2015

STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

CITY OF HOLLAND, Plaintiff-Appellee,	Supreme Court No. 151053
v	Court of Appeals No. 315541
CONSUMERS ENERGY COMPANY, Defendant-Appellant.	Lower Court 12-002758-CZ
and	
CITY OF COLDWATER, Plaintiff-Appellee,	Supreme Court No. 151051
v	Court of Appeals No. 320181
CONSUMERS ENERGY COMPANY, Defendant-Appellant.	Lower Court 13-040185-CZ

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ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S *AMICUS CURIAE* BRIEF

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Dated: June 8, 2015

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Association of Businesses Advocating Tariff Equity ("ABATE") is a 34 year old unincorporated business association of major energy-consuming corporations who have joined together to solve problems related to the supply of electric power and transportation of natural gas to industrial facilities located in the State of Michigan. ABATE's members from the auto, steel, chemical, and other large manufacturing industries have a substantial impact on jobs and Michigan's overall economy, since they employ more than 145,000 people and have a Michigan payroll of over $3.3 billion. A significant amount of ABATE's activities involve representing the interests of its members before courts, the United States Congress, the Michigan Legislature, and state and federal administrative regulatory agencies. ABATE appears before this Court as a representative of a number of major energy-consuming corporations which collectively make up a substantial part of Michigan's industrial economy and are likely to be adversely affected by the issues currently before this Court.

ABATE has from time to time been invited by the Michigan Supreme Court to file Amicus Briefs on issues substantially affecting utility rates and issues. This is one of those cases. The Court of Appeals below accepted ABATE's Amicus Brief.

This appeal, which is brought by Consumers Energy Company ("Consumers"), argues it has an exclusive monopoly right to serve the customers in this case, notwithstanding the Michigan Constitution, numerous statutes, and the customers' wishes, to the contrary. This asserted monopoly right, if sustained, will have the most serious adverse consequences for Michigan's economy, all utility customers trying to compete nationally and globally from Michigan with its uncompetitively high electric rates, and municipalities, as more fully described below.

STATEMENT OF JURISDICTION

Amicus ABATE adopts by reference the Jurisdictional Statement set forth in the Briefs of Appellees.

COUNTER STATEMENT OF ORDER FROM WHICH THE APPEALS WERE TAKEN AND RELIEF SOUGHT

Appellant Consumers Energy Company seeks to appeal from a published decision of the Court of Appeals . In addition, Consumers alternatively requests summary reversal. (Consumers' App at 16.)

As set forth in this Brief, the result reached by the Court of Appeals is fundamentally correct and should not be disturbed by this Court. However, an erroneous statement of this Court in *Great Wolf Lodge Traverse City LLC v Public Service Commission,* 489 Mich 27; 744 NW2d 155 (2011) has lead to serious unintended consequences in the municipal utility arena and should be corrected either summarily or by granting leave to appeal limited to the application of Rule 411(11), Mich Adm Code, R 460.3411(11) to municipal utilities.

STATEMENT OF QUESTIONS PRESENTED

Amicus ABATE adopts by reference the Counterstatement of Questions Presented set forth in the Briefs of Appellees.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S
***AMICUS CURIAE* BRIEF ON BEHALF OF THE POSITION OF APPELLANT**

The Association of Businesses Advocating Tariff Equity ("ABATE"), by its attorneys, Clark Hill PLC, and pursuant to MCR 7.212(H), respectfully files this *Amicus Curiae* Brief and generally supports the positions taken by Appellees, as stated in Appellees' Briefs on Appeal.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus ABATE adopts by reference the Statement of Facts and Procedural History set forth in the Briefs of Appellees.

II. STANDARD OF REVIEW

Amicus ABATE adopts by reference the Standard of Review as set forth in the Briefs of Appellees.

III. LAW AND ARGUMENT

A. The Importance Of This Case.

Michigan has a huge problem with uncompetitively high electric rates. This was documented **again** in a report to the Governor entitled "Readying Michigan to Make Good Energy Decisions"[1], issued November 15, 2013 by the Chairman of the Michigan Public Service Commission and the Director of the Michigan Energy Office wherein it is stated:

> "In recent years, Michigan's electricity rates have risen to levels that are higher than the national average, and also higher than surrounding Midwest states." (page 4).

The report also indicates that these high electric rates "are the highest in the Midwest, making this state less attractive to manufacturers, and inhibiting the jobs and economic multiplier affect manufacturers could provide." (page 6). These uncompetitively high electric rates are the

[1] http://www.michigan.gov/documents/energy/Additional_Areas_final_440032_7.pdf.

rates of investor owned utilities, like Consumers here, purportedly regulated by the Michigan Public Service Commission ("PSC"), and who have since the report requested still higher rates.

Under Michigan's Constitution and numerous statutes, however, electric utility service can be provided by a municipal electric service provider (i.e. a municipal "utility" in common understanding, but at the PSC, municipal utilities are not "utilities" by definition under its rules; "utilities" are only utilities regulated by the MPSC and the MPSC has no jurisdiction over municipal electric service providers). Municipal electric rates are generally lower than the PSC regulated utility rates like Consumers' rates, and the option of municipal electric service has provided some relief from the uncompetitively high electric rates referenced above and are critically necessary for economic expansion in Michigan at the current time.

Consumers' arguments in this case threaten to eliminate the lower cost municipal electric rate option entirely and require service be taken from only a monopoly provider. Consumers contends that customers in this case must always[2] take Consumers' monopoly service and pay the higher PSC "regulated" prices. Generally, monopolies are not in the public interest and not favored in the law, so arguments to expand a monopoly, like Consumers advances here, should be viewed skeptically by this Court. Consumers' "absolute monopolization" argument, if sustained, not only eliminates any possible growth of municipal electric service providers, but even threatens the continued viability of Michigan's more than 40 municipal electric service providers as population in urban centers declines, and the only growth to replace lost sales occurs outside municipal limits where Consumers argues customers must only take its monopoly service. Michigan clearly does not need another financial problem for its municipalities, which Consumers' arguments and interpretations here would clearly create.

[2] Since the PSC defines municipal electric providers as NOT "utilities", a municipal electric service provider, by definition, can NEVER be the first "utility" to serve a parcel or tract.

Additionally, municipal utilities serve a valuable public interest role by demonstrating that electric utility service can be provided in Michigan significantly more economically than the electric service provided by the PSC "regulated" monopolies. This lower rate reality, while no doubt an irritant that Consumers and other PSC regulated monopolies hope to be rid of, stands as a powerful benchmark of what rates are possible in Michigan. Moreover, the mere possibility that other municipalities might choose to create utilities, as is their constitutional right[3], to provide lower cost power to their businesses and residents has, on more than one occasion, kept unnecessary rate increase requests by PSC regulated utilities in check. Consumers' argument here leads directly to the likely elimination of these unflattering municipal rate comparisons and the extension of Consumers monopoly.

Lower municipal electric rates have played an important part in enabling Michigan to attract expanded investment in the large manufacturing industries upon which Michigan's economy rests, despite uncompetitively high PSC regulated utility rates, because municipal electric rate options were available (e.g., two large auto facilities built outside Lansing in areas served by a municipal electric utility and recent 2015 announcements of hundreds of millions of dollars of investment to expand in areas served by municipal electric service providers).

Since *Great Wolf Lodge*, however, the municipal option has largely be extinguished. Consider this real world example: Company A had two large factories making the same product. One factory was in Michigan; the other factory was in another state with lower electricity rates. If the Michigan factory had access to lower municipal rates it could compete to keep the production and jobs in Michigan. The local Municipality was agreeable to forming a municipal utility as is its Constitutional right – until it learned of the *Great Wolf Lodge* decision. While it

[3] Const 1963, Art 7, Sec 24.

desperately wanted to keep the factory and the Michigan jobs, it felt it could not expose the municipality to the costly litigation that would likely result because of the *Great Wolf Lodge* decision and the probability that the incumbent electric utility would claim it had the absolute right to serve that factory. Much of the Michigan production, and jobs, were lost to the other state. The negative impacts of *Great Wolf Lodge* are not theoretical; they are affecting peoples' lives. And the municipalities Constitutional right to create an electric utility, it was effectively rendered a nullity.

Consumers argues that if it is the first "utility" to serve in an area, it has the absolute right to do so in perpetuity, no matter what -- no matter that electric service is ended or abandoned; no matter that there is no customer for generations; no matter that the premises are all demolished and the property is returned to farm land for generations; no matter that the Constitution and statutes say otherwise -- no matter what. In effect, Consumers' position is that it has the absolute perpetual right to serve the dirt, even if any customer or building is long gone. This absolute claim is based on: (i) an administrative rule (Rule 411) created by the PSC– a rule Consumers argues overrides the Michigan Constitution, numerous statutes, the plain language of the rule itself, plain logic long standing practice, and even common sense; and (ii) "extend[ing]"[4] *Great Wolf Lodge v PSC*, [5] 489 Mach 27; 799 NW2nd 155 (2011). If Consumers' extreme interpretation is not rejected, it will lead to decades of unnecessary and wasteful litigation as there will be a rush to the historical records to see if an historical ancestor to a PSC-regulated utility ever provided service to a parcel or tract, or an adjacent parcel or tract. If so, it might give

[4] See Consumer application for Leave to Appeal, p 2.

[5] *Great Wolf Lodge*, an anomalous 4 to 3 decision of the Supreme Court is undoubtedly a troublesome case in that it disrupted settled law on the type of facts present there and forced the PSC's Rule 411 into a situation which by its own terms it was not to apply. The decision has created much more litigation. Consumers' here seeks to inflate its scope and construction and "extend" it's erroneous reach. Both of the lower courts correctly found it was not applicable here, as did three Judges of the Court of Appeals. Nonetheless, *Great Wolf Lodge* was wrongly decided and should be summarily reversed. See Dissenting Opinion of Justices Markman, Hathaway, and Zahra. The case is discussed further below.

rise to this newly-created windfall opportunity created by the unfortunate language in *Great Wolf Lodge* that a PSC regulated "utility" has the absolute right to serve a given parcel even if that parcel is currently being served (and has long been served) by a municipal electric service provider.

In short, this case is extremely important to (i) electric utility customers and their ability to compete nationally and internationally, (ii) municipalities and their ability to sustain providing municipal electric utility service in their communities, and (iii) whether Michigan will be viewed as a state where there is ever any possibility of securing more competitive electric rates, rather than being resigned to clearly uncompetitively high PSC-regulated electric utility rates.

B. The Constitution And Numerous Statutes Assure Customers Will Have The Option To Be Served By A Municipal Electric Utility Provider.

Cities, villages, and townships have the exclusive authority to issue franchises determining who can provide electric utility service and conduct local business. Const. 1963, art 7, § 29. Cities and villages also have the constitutional right to provide electric utility service themselves within and outside their corporate limits. Const 1963, art 7 §24. The reach of a municipal utility's service area is limited by the Constitution. Article 7, § 24 authorizes a city or village to supply electric power outside its corporate limits in an amount not exceeding 25% of that supplied within its corporate limits except as greater amounts may be authorized by law. The Legislature removed the restriction on the amount of electric power that a city or village may supply outside its corporate limits but imposed two additional restrictions: (1) a city or village may, with limited exceptions, supply electric power beyond municipal units if they are adjacent to the city or village; and (2) a city or village may not extend service to a customer already receiving that service from another utility. MCL 124.3 (cities and villages); MCL 117.4f(c) (home rule cities). These are the only limitations on the constitutional authority of a city or

village to supply electric power outside of its corporate limits. Apart from these limitations, a city or village may serve any prospective customer in any municipal area in which it holds a franchise.

In comparison, a utility regulated by the PSC, in addition to securing a locally granted franchise, must obtain a certificate of convenience and necessity from the PSC. MCL 460.501 et seq. Municipal utilities are not regulated by the PSC so they are not required to obtain a certificate of convenience and necessity.

In municipalities where more than one utility is franchised to operate (typically a PSC-regulated utility and a municipal utility), the PSC and the Legislature have each separately enacted rules governing which utility may provide service to a particular customer. Accordingly, the PSC 's rule, "Rule 411" (Mich Adm Code, R 460.3411), governs competition between utilities that are regulated by the PSC. And correspondingly, the Legislature has enacted statutory provisions applicable when at least one of the competing utilities is a municipal utility. These statutory provisions prohibit extension of service to a customer already receiving service from another utility without the written permission of the other utility. MCL 124.3(2); MCL 460.10y(2).

Rule 411 and the statutory municipal provisions do not apply in the same fact settings and are mutually exclusive. Rule 411 applies when both or all of the utilities are subject to the PSC's jurisdiction. The statutory municipal provisions apply when a municipal electric provider is involved.

As it did in the Holland case, Consumers asserts that it has the exclusive right to serve here under both Rule 411 and the statutory municipal provisions governing competition with and between municipal utilities. As argued below, Consumers' assertions are wrong on both counts.

C. The PSC Has No Jurisdiction Over Municipal Electric Providers Nor Property Owners.

Municipal utilities are not regulated by the PSC. MCL 460.6(1) ("The Public Service Commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility…"); MCL 460.10y(11) ("As provided in section 6, the commission does not have jurisdiction over a municipally owned utility,"). Further, the administrative rule involved in this case, Rule 411, Mich Adm Code, R 460.3411, on its face, does not apply to municipal utilities. Mich Adm Code R 460.3102(1). ("'Utility' means an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission.") In fact, the Legislature itself has recognized that Rule 411 is not applicable to a municipal utility unless the municipal utility affirmatively elects to be governed under it. MCL 460.10y(3).

Additionally, contrary to Consumers assertions, neither the PSC nor its Rule 11 regulate "the rights of land owners." Consumers App., p 10. The PSC is an administrative agency created by the legislature with only the specific jurisdiction and powers granted by the legislature. *Huron Portland Cement Co v MPSC*, 351 Mich 255: 88 NW2nd 492 (1958). Nowhere has any statutory authority been cited, nor can there be, for the PSC to regulate landowners or utility customers. The PSC's jurisdiction is over the rates and services provided by public utility companies as provided by law[6], NOT utility customers nor prospective utility customers such as landowners. What Consumers references is the unfortunate and erroneous language in *Great Wolf Lodge* implying such a stunning judicial expansion of an administrative agency's jurisdiction for which there is no statutory authority whatsoever. *Great Wolf Lodge* and the disruptions it has singularly created are discussed further below.

[6] MCL 460.6.

D. Rule 411 is a PSC Created Rule Applicable Only to Utilities Under Its Jurisdiction.

Rule 411 governs competition for electric delivery service among utilities regulated by the MPSC . As relevant here, Rule 411 provides that:

> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.

The rule established by subsection 11 of Rule 411 is sometimes referred to as the "rule of first entitlement," "first to serve the premises rule," or the "premises rule."

By its own terms, Rule 411 applies *only* to utilities which are regulated by the PSC. The term "utility" is defined as follows:

> (1) "Utility" means an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission.

Mich Adm Code, R 460.3102(1) (emphasis added). The PSC's rules further expressly state that they apply only to regulated utilities:

> (1) These rules apply to electric utilities that operate within the state of Michigan under the jurisdiction of the public service commission. Mich Adm Code, R 460.3101.

As discussed above, municipal utilities are not within the PSC's jurisdiction. Accordingly, on its face, Rule 411 does not apply here. There is no statute giving the PSC jurisdiction or authority over municipally-owned utilities such as the Appellees. To the contrary, at least three statutes expressly state that the MPSC does *not* have jurisdiction over municipal utilities. See MCL 460.6(1) ("The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility…"); MCL 460.10y(11) ("As provided in section 6, the commission does not have jurisdiction over a municipally owned utility…,"); MCL 460.54 ("The power and authority granted by this act shall

not extend to, or include, any power of regulation or control of any municipally owned utility…"). Thus, rules of the PSC have no applicability to municipal utilities.

The PSC itself has correctly recognized that Rule 411 is inapplicable in competitive disputes involving municipal utilities. In response to the filing of the *Holland* case, Consumers filed a request with the PSC for a declaratory ruling affirming Consumers' exclusive right to provide service to the property at issue in that case. The PSC declined Consumers' request stating:

> The Commission finds that, if it were to issue a declaratory ruling in this case, it would not be binding on HBPW [Holland Board of Public Works] or Benjamin's Hope [the customer]. As discussed above, HBPW and Benjamin's Hope chose not to intervene in this case, and thus are not parties to this action. In addition, pursuant to MCL 460.6, the Commission does not have jurisdiction to regulate municipally-owned utilities such as HBPW. As a result, the Commission finds that Consumers' request for declaratory relief should be denied. *In the matter of the application of Consumers Energy Company for a declaratory ruling on application of Rule 411(11) to 40 acres of land located at 15468 Riley Street, Holland, Michigan,* MPSC Case No. U-17011, at 3-4.[7]]

It is clear enough from the text of the PSC's rules that they do *not* apply to a municipal utility. The Legislature has also made it clear the Rule 411 does not apply *unless* the municipal utility unilaterally elects to be governed by MCL 460.10y(3). Consumers' interpretation would completely nullify this statute. MCL 460.10y(3) provides that :

> With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code, as in effect on June 5, 2000. However, compliance with R 460.3411(13) of the

[7] Available at http://efile.mpsc.state.mi.us/efile/docs/17011/0020.pdf.

> Michigan administrative code is not required for the municipally owned utility…[8]

Appellees have not elected to be governed by Rule 411, so Rule 411 is inapplicable here.

E. State and Federal Laws and Policies for Decades Now Have Emphasized the Need for Competition and Market Disciplines In the Electric Utility Industry and Avoiding Duplicate Facilities Is A Secondary Concern

Consumers claim's the PSC's Rule 411's "entire reason for being" is the avoidance of duplication of facilities. Consumers App at 12-13. And further Consumers argues "the manifest intent of the Legislature" was to eliminate the unnecessary cost in the form of duplicate electric utilities." Consumers App p. 14. These claims are both antiquated as well as erroneous. First, Rule 411 was first adopted many decade ago[9] when monopoly utility service was the norm.

Much has changed since then. Michigan is one of 16 states that have electricity service competition,[10] though Consumers is actively working to legislatively eliminate customer choice and such competition.[11]. Electric utility competition inherently requires some amount of duplicate facilities. The Michigan Legislature[12], as well as the federal government[13], has for decades now been implementing polices designed to introduce more competition and market discipline into the electric utility marketplace, which brings with it the inherent and necessary duplication of some facilities, in order to give customers a choice of electricity provider. The

[8] Consumers' position here stands this statute on its head. Under Consumers' interpretation, whether Rule 411 is applicable is no longer the option of the municipal utility; it is the option of the PSC-regulated utility. That is *not* the law.
[9] Rule 411 was adopted in 1983 as part of the "Technical Standards for Electric Service".
[10] http://www.michigan.gov/documents/energy/electricc_report_440539_7.pdf, p. 13.
[11] If Consumers legislative efforts were to succeed and *Great Wolf Lodge* were to stand, it's desire for an absolute monopoly would have largely been accomplished.
[12] See The Customer Choice and Electric Reliability Act, MCL 460.10 the purpose of which was "To ensure that all retail customers in this state of electric power have a choice of electric suppliers." MCL 460.10(2)(a).
[13] See landmark competition order of Federal Energy Regulatory Commission, Order 888, issued April 24, 1996, which "requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non- discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service". 75 FERC 61,080 and numerous subsequent orders.

overriding policies of the current day are that competition provides more cost discipline and benefits to the public than avoiding any duplicate facilities. In short, avoiding duplicate facilities is not the concern it once was, and it has been supplanted by laws and policies thought to provide greater public interest benefits (i.e., encouraging competition and allowing some duplication). This Court should not advance antiquated notions long superseded by more recent Michigan Legislative enactments and federal laws and policies in order for Consumers to advance it outdated "absolute monopoly" desires .

F. Great Wolf Lodge, While Disruptive of Settled Law, Is Neither Controlling Nor Applicable to The Cases at Hand, But Should Be Summarily Reversed

The lower courts' conclusions here that neither *Great Wolf Lodge*[14] nor Rule 411 was applicable is consistent with longstanding understanding, practice and law. Nonetheless, this Court should revisit and summarily reverse *Great Wolf Lodge* and re-settle the longstanding law and practice the decision has disturbed. This Court should not advance Consumers' efforts to construe *Great Wolf Lodge* so as to enlarge and extend its monopoly, eliminate potential competition, and undermine municipal utilities' sustainability.

Prior to *Great Wolf Lodge*, no one in the electric utility industry thought that PSC Rule 411 and its "premises rule" had any application to municipal utilities.

This fact is well illustrated by the opinion issued by the PSC itself in the contested case proceeding which was the subject of the Supreme Court's review in *Great Wolf Lodge*. There, the PSC said "Rule 411 does not purport to alter the rights and obligations of a non-jurisdictional

[14] The Supreme Courts' narrowly-decided 4-3 opinion in *Great Wolf Lodge* was an unimaginable windfall for an electric utility seeking to avoid unfavorable rate comparisons and potential competition. The decision has created the irresistible temptation for Consumers to try to extend its construction and scope to once and for all eliminate all potential competition from the lower electric rate municipal utilities and put them in a declining state, unable to expand in the only areas of growth - outside their limits.

utility," citing the rule applying Rule 411 only to utilities "Operat[ing] under the jurisdiction of the commission." *In the matter of the Complaint of Great Wolf Lodge of Traverse City against Cherryland Electric Cooperative*, Case No. U-14593, May 25, 2006 at 17. (emphasis added).

Before *Great Wolf Lodge*, it was universally understood and accepted that competition between PSC-regulated utilities was governed by PSC Rule 411, and competition with municipal utilities was governed by the "no switch" rules in MCL 124.3(2), MCL 117.4f, and MCL 460.10y (the "No Switch Statutes"). The system worked; and it worked without market disruptions and wasteful duplications; but not since *Great Wolf Lodge*.

Rule 411's premises rule and the No Switch Statutes are mutually exclusive. The premises rule, as interpreted by the Supreme Court in *Great Wolf Lodge*, apparently gives the first PSC-regulated "utility" to provide service on a tract of land the perpetual and exclusive right to provide service to the entire tract, no matter how many times that tract is subdivided, no matter whether any service is currently being provided, and no matter whether a "customer" even exists. Thus, under the premises rule, a vacant parcel with no structures could be subject to the exclusive right of entitlement of a utility which provided service to some other part of the tract generations earlier. This could never happen under the No Switch Statutes because in the absence of a current occupant or building or facilities, there is no "customer" (under any definition) and no prohibition against service being provided by any other utility operating in the area that the customer chooses. Because the premises rule and the No Switch Statutes are mutually exclusive, the net effect of the position advocated by Consumers is the displacement by an administrative rule of no less than three statutes enacted by the Legislature.

PSC-regulated utilities want municipal utilities to be subject to Rule 411 and the premises rule because a municipal utility can *never* win competitive skirmishes under Rule 411. This is

because a municipal utility is not a "utility" as the term is defined for purposes of Rule 411. *See*, Mich Adm Code, R 460.3102(1). Because a municipal utility is not a "utility," it can never be the *first* utility to serve a premises and, therefore, it can never be the beneficiary of the premises rule. Thus, this a perfect outcome for PSC-regulated utilities, since they will always be the first "utility" to serve.

This scenario where the PSC-regulated utility always wins is not only obviously unfair and unreasonable, it was previously never allowed to occur under settled law. Since *Great Wolf Lodge*, however, we have seen the elevation of the PSC's Rule 411 above Legislative enactments resulting in manifest injustice and unfairness, as well as more unnecessary litigation. This Court should re-settle the law disturbed by *Great Wolf Lodge* and summarily reverse that decision as 3 Dissenting Justices in *Great Wolf Lodge* had originally concluded.

IV. RELIEF REQUESTED

WHEREFORE, ABATE requests this Court to find that neither Rule 411 nor *Great Wolf Lodge* apply to these facts and circumstances, but to also revisit and summarily reverse Great Wolf Lodge as wrongly decided.

Respectfully submitted,

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Dated: June 8, 2015

IN THE SUPREME COURT OF MICHIGAN

CITY OF HOLLAND, Plaintiff-Appellee,	Supreme Court No. 151053
v	Court of Appeals No. 315541
CONSUMERS ENERGY COMPANY, Defendant-Appellant.	Lower Court 12-002758-CZ
and	
CITY OF COLDWATER, Plaintiff-Appellee,	Supreme Court No. 151051
v	Court of Appeals No. 320181
CONSUMERS ENERGY COMPANY, Defendant-Appellant.	Lower Court 13-040185-CZ

PROOF OF SERVICE RE
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
AND
***AMICUS CURIAE* BRIEF**

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

JANICE M. WILBRINK, being first duly sworn, deposes and says that on June 8, 2015, she did cause to be served the **Association of Businesses Advocating Tariff Equity's Motion for Leave to File an *Amicus Curiae* Brief, and *Amicus Curiae* Brief**, as well as this **Proof of Service**, in the above docket, via electronic filing with the Michigan Supreme Court and via electronic mail to the persons identified on the attached service list.

/s/ Janice M. Wilbrink
Janice M. Wilbrink

SERVICE LIST
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